STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LYNN KRANZ and LORRIE SCHULTZ, Complainants,

vs.

CITY OF NEW LISBON, Respondent.

Case 14
No. 58584
MP-3611

Decision No. 29885-A

Appearances:

Attorney Sally A. Stix, 7609 Elmwood Avenue, Suite 202, Middleton, Wisconsin 53562-3134, appearing on behalf of Lynn Kranz and Lorrie Schultz.

Curran, Hollenbeck & Orton, S.C., by **Attorney Fred D. Hollenbeck**, 111 Oak Street, P.O. Box 140, Mauston, Wisconsin 53948-0140, appearing on behalf of the City of New Lisbon.

ORDER DENYING MOTION TO DISMISS COMPLAINT, DENYING MOTION TO SEPARATE COMPLAINANTS AND CLAIMS, DENYING MOTION TO DISCOVER THE MEDICAL RECORDS OF COMPLAINANTS, GRANTING MOTION TO MAKE THE COMPLAINT MORE DEFINITE AND CERTAIN, AND DENYING COMPLAINANTS' MOTION TO STRIKE

Lynn Kranz and Lorrie Schultz, hereinafter Complainants, filed a complaint with the Wisconsin Employment Relations Commission on February 24, 2000, alleging that City of New Lisbon, hereinafter Respondent, had committed prohibited practices by interfering with the exercise of their protected rights, and by refusing to bargain over Complainants' wages, hours and conditions of work. On February 29, 2000, Respondent filed a letter with the Commission wherein it stated that the complaint "is so indefinite that we cannot respond to it." In said letter, Respondent also denied the complaint allegations. On May 5, 2000, hearing in

the matter was scheduled for August 1, 2000. On May 9, 2000, hearing was postponed to August 4, 2000, at the request of Complainants' attorney. On June 7, 2000, the parties had a pre-hearing settlement conference. On June 12, 2000, Respondent filed a Motion to Dismiss the complaint, a Motion to Separate Complainants and Claims, and a Motion to Discover the Medical Records of Complainants. On June 21, 2000, Complainants filed a Motion to Strike. On June 19, 2000, the hearing was indefinitely postponed. On July 12, 2000, Complainants filed a letter with the Commission wherein Complainants, in relevant part, requested an immediate ruling on Complainants' Motion to Strike. On July 20, 2000, the Examiner denied said request. On July 26, 2000, the parties completed their briefing schedule regarding the aforesaid Motions.

The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

ORDER

1. The prehearing Motion to Dismiss is denied.

2. The prehearing Motion to Separate Complainants and Claims is denied.

3. The prehearing Motion to Discover the Medical Records of Complainants is denied.

4. The prehearing Motion to Strike filed by Complainants is denied.

5. The Motion to Make the Complaint More Definite and Certain is hereby granted.

6. The Complainants shall amend their complaint to show clearly and concisely by a statement of facts what constitutes the actions of Respondent that interfered with, restrained, or coerced Complainants in the exercise of their rights guaranteed in Sec. 111.70(2), Stats. Complainants also shall amend their complaint to show clearly and concisely, by a statement of facts, what constitutes the actions of Respondent in refusing to bargain collectively with Complainants within the meaning of Sec. 111.70(3)(a)4, Stats. Complainants further shall amend their complaint to show clearly and concisely, by a statement of facts, what constitutes the actions of Respondent in violation of Sec. 111.70(3)(c), Stats. Complainants shall include in their amended complaint specific times, locations, names of Respondent representatives or agents involved in the foregoing allegations, occurrence(s) out of which the claims arise and the specific acts performed by Respondent representative or agents which Complainants believe entitles them to relief. Complainants shall also state specifically why they believe they are entitled to relief for Respondent's actions.

7. The Amendment shall be filed on or before August 18, 2000, with the Examiner, with a copy of same mailed directly to:

Mr. Fred D. Hollenbeck
Curran, Hollenbeck & Orton, S.C.
Attorneys at Law
111 Oak Street
P.O. Box 140
Mauston, WI 53948-0140

on the same date.

8. The date for filing an answer to the Amended Complaint is hereby extended to September 8, 2000.

Dated at Madison, Wisconsin, this 3rd day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan s/
Dennis P. McGilligan, Examiner

CITY OF NEW LISBON

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS COMPLAINT, DENYING MOTION TO SEPARATE COMPLAINANTS AND CLAIMS, DENYING MOTION TO DISCOVER THE MEDICAL RECORDS OF COMPLAINANTS, GRANTING MOTION TO MAKE THE COMPLAINT MORE DEFINITE AND CERTAIN, AND DENYING COMPLAINANTS' MOTION TO STRIKE

On June 12, 2000, Respondent filed a Motion as noted above. On June 21, 2000, Complainants filed a Motion as noted above. Thereafter, the parties briefed the matter.

MOTION TO DISMISS COMPLAINT

Respondent moves for an order "dismissing the claims of the complainants upon the theory that the same are barred by the doctrines of res judicata, collateral estoppel and issue preclusion."

Respondent basically argues that the claims of Complainant Kranz have been previously litigated upon and are therefore barred from relitigation. In support thereof, Respondent maintains that Complainant Kranz could have litigated the "cause attributable to the employer" issue as part of her unemployment compensation claim and specifically and expressly declined to do so. Respondent claims that Complainant Kranz now seeks to litigate the "causes attributable to the employer" in the instant proceedings. Respondent submits that since Complainant Kranz could have litigated the "causes attributable to the employer" issues in the unemployment compensation forum, that the doctrines of res judicata, collateral estoppel and issue preclusion forbid her from litigating that issue in this forum. Respondent argues that it is the law in Wisconsin that failure to litigate an issue which might have been litigated in the former proceedings bars the litigant from litigating the issue again in subsequent proceedings. Respondent adds that these rules of law apply to State administrative agencies, as well as the courts.

Complainants argue that the doctrines of issue preclusion, collateral estoppel and res judicata have no bearing on this case citing Chapter 108 of the Wisconsin Statutes, Unemployment Insurance and Reserves. In this regard, Complainants concede that the Labor and Industry Review Commission ("LIRC") did make a determination on Complainant Kranz's unemployment insurance claim but based on Chapter 108 Complainant submits this decision may not be used in any manner in the proceeding currently before the Commission. (Emphasis

in original) Complainants add that under Wisconsin laws, Complainants may litigate the issues asserted in their complaint, and the determinations of the LIRC in the unemployment insurance hearing are irrelevant to this case. (Emphasis in original)

Claim preclusion is the term now applied to what used to be known as res judicata. This doctrine establishes that "a final judgment between the parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose." DANE COUNTY V. AFSCME LOCAL 65, 210 N.W. 2D 268, 565 N.W. 2D 540 (CTAPP, 1997).

The Commission has applied the doctrine of res judicata since at least 1957. WISCONSIN TELEPHONE COMPANY, DEC. NO. 4471 (WERC, 3/57). The Commission has applied the doctrine of claim preclusion in cases arising under the Wisconsin Peace Act, the Municipal Employment Relations Act, MORAINE PARK VTAE ET AL., DEC. NO. 22009-B, (WERC, 11/85), and the State Employment Labor Relations Act. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, DEC. NO. 23885-D (WERC, 2/88).

The Commission applies claim preclusion thus:

> (T)he dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought (must) share an identity of parties, issue and remedy.
>
> In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute.
> WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL., DEC. NO. 28543-B (WERC, 12/97).

Issue preclusion is the term now applied to what was formerly referred to as collateral estoppel. It is "a flexible doctrine that is bottomed in concerns of fundamental fairness and requires that one must have had a fair opportunity procedurally, substantively and evidentially to litigate the issue before a second litigation will be precluded."" DANE COUNTY, SUPRA. Although issue preclusion does not require an identity of parties, it does require actual litigation of an issue necessary to the outcome of the first action. MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/23/98).

Respondent basically argues that Complainant Kranz should not be permitted now to litigate that which she would have and could have litigated in the Unemployment Compensation hearing. However, this is the first time Complainant Kranz has appeared in a

forum having jurisdiction to hear, decide and remedy claims brought under the Municipal Employment Relations Act. Therefore, the Examiner rejects this argument of Respondent and finds that the aforesaid doctrines are not applicable to the instant dispute.

As pointed out by Complainants, Chapter 108 of the Wisconsin Statutes, Unemployment Insurance and Reserves, provides an independent basis for denying Respondent's Motion to Dismiss Complainant Kranz's claim:

> No finding of fact or law, determination, decision or judgement (sic) made with respect to rights or liabilities under this chapter is admissible or binding in **any** action or administrative or judicial proceeding in law or in equity not arising under this chapter, unless the department is a party or has an interest in the action or proceeding because of the discharge of its duties under this chapter. Wis. Stats. §108.101(1). (Emphasis in original)

MOTION TO SEPARATE COMPLAINANTS' CASE

Respondent also moves to separate Complainants' case. In support thereof, Respondent argues that the events underlying the individual claims of each Complainant are dramatically different. Respondent adds that different allegations have been made regarding separate incidents occurring in the presence of either but not always both Complainants. Respondent submits that to proceed without severance exposes it "to guilt by heaping-on of unrelated and unsubstantiated allegations."

Respondent also argues that separating the two claims will prejudice no one, will prevent unnecessary confusion and will help clarify the issues.

Complainants, on the other hand, argue that it would be absurd to separate Complainants' case because one of the primary issues is concerted activity. (Emphasis in original) Complainants add: "Concerted activity means did the two Complainants act in concert when they initiated a job action. There is simply no basis for separating a 'concerted activity' case."

Complainants also argue that separating the case "would be confusing, it would unnecessarily duplicate the trial and waste everyone's time and money."

The record to date supports Complainants' position. Attachment "A," Section C of the complaint alleges that "Complainants' concertedly did not go to work beginning on January 26, 2000 due to harassment they had been receiving from the Mayor and Police Chief." Section C also alleges that "On February 2, 2000 at a City Council meeting,

Complainants' (sic) requested to bargain over their working conditions in order to return to work." The Examiner agrees with Complainants that it would not make any sense to separate a "concerted activity" case.

It is true, as pointed out by Respondent, that "different allegations have been made regarding the separate incidents occurring in the presence of either but not always both of the complainants." However, Respondent has not shown how severing these two claims "serves the important adjudicatory purpose of preventing confusion and clarifying the issues."

MOTION TO DISCOVER MEDICAL RECORDS

Respondent argues that the medical records of Complainants are discoverable.

However, as pointed out in Complainants' response brief, Complainants "are not seeking compensation for their harassment in the form of medical damages." In addition, Complainants seek reinstatement to their positions; back pay and benefits and to be made whole. Based on the foregoing, the Examiner finds that Complainants' medical records are irrelevant to Respondent's case at this time and are not discoverable.

MOTION TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN

Respondent argues Complainants should be required to submit a more definite and certain complaint.

Respondent requests that Complainants be required to provide a complaint that is more definite and certain regarding what exactly the plaintiffs' claim is; identifies specifically the transaction(s) or occurrence(s) out of which the claim arises; alleges why each Complainant believes they are entitled to relief from the Court; and identifies the parties or defendants and the specific acts performed by each defendant which they believe entitles them to relief.

Complainants argue that Respondent failed to move for a more definite statement within "5 days after the service of the complaint" pursuant to ERC 12.03(3). By letter dated February 25, 2000, Respondent was served with a copy of the complaint filed on February 24, 2000, by Complainants. By letter dated February 28, 2000, Respondent raised an issue regarding the complaint being "so indefinite that we cannot respond to it." The Examiner will treat this as a Motion to Make Complaint More Definite and Certain. Since it was filed within three days of service of complaint, Respondent's Motion is timely pursuant to the aforesaid Administrative Rule.

Complainants argue that they filed a clear, concise and brief complaint which states with specificity the factual bases for the "unfair labor practices claim by Complainants and the applicable statutes." Complainants conclude that the complaint complies with the statutory requirement for WERC complaints.

Wisconsin Administrative Code, Section ERC 12.02(2), (c), provides that a complaint must contain a "clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby."

In order to comply with the Commission's rules, the Examiner has granted the Respondent's Motion to Make the Complaint More Definite and Certain by requiring Complainants to amend their complaint to show clearly and concisely, by a statement of facts, what constitutes the actions of Respondent that interfered with, restrained, or coerced Complainants in the exercise of their rights guaranteed in Sec. 111.70(2), Stats. Complainants are also required to amend their complaint to show clearly and concisely, by a statement of facts, what constitutes the actions of Respondent in refusing to bargain collectively in violation of Sec. 111.70(3)(a)4, Stats. Complainants are also required to amend their complaint to show clearly and concisely, by a statement of facts, what constitutes the actions of Respondent in violation of Sec. 111.70(3)(c), Stats.

Contrary to Complainants' assertions, and consistent with the requirements of ERC 12.02(2), (c) of the Wisconsin Administrative Code, the Examiner finds that the information sought by the Respondent will enable it to determine with specificity the facts constituting the alleged prohibited practice and to permit it to prepare a response to the charge. Therefore, the Complainant is ordered to provide said information.

COMPLAINANTS' MOTION TO STRIKE

On June 21, 2000, Complainants filed a Motion to Strike Respondent's Motion filed on June 12, 2000. The Examiner has addressed most of the issues raised by Complainants' Motion to Strike in the discussion above. In this regard, the Examiner has denied Respondent's Motion to Dismiss, Motion to Separate Complainants and Claims, Motion to Discover Medical Records of Complainants and has granted Respondent's Motion to Make the Complaint More Definite and Certain.

Complainants argue that Respondent's June 12 Motion is untimely. However, Complainants cite no authority in support of this argument. Therefore, it is denied.

Based on the foregoing, the Examiner denies Complainants' Motion to Strike.

In addition, Complainants seek attorney fees "for having to respond to this frivolous, delaying tactic used by the Respondents. Not only is it late and unfounded, but it is a measure designed to prolong the proceedings without justification."

The record does not support a finding that Respondent's Motions are made in bad faith with intent to delay the proceeding, and/or are frivolous. The Examiner finds no basis in the record to grant Complainants' request. Therefore, the Examiner denies Complainants' request for attorney fees.

Dated at Madison, Wisconsin, this 3rd day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

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